

¹ Page 1 of the document dates the Award March 25, 2009, and page 9 dates the Award March 30, 2009.

her employment with respondent. Accordingly, the Judge denied claimant's request for workers compensation benefits.

Claimant filed this appeal and argues the testimony of respondent's witnesses, namely co-workers and supervisors, is inconsistent regarding the standing and bending that claimant performed and, therefore, she has proven she injured her back working for respondent. Claimant requests the Board to reverse the March 30, 2009, Award and find that claimant is entitled to receive workers compensation benefits for her alleged accident.

Respondent contends claimant did not prove she injured her back working for it. Respondent asserts this claim hinges upon claimant's credibility and that she has not been truthful. Further, respondent argues claimant failed to provide timely notice of her accidental injury. Hence, respondent requests the Board to deny claimant's request for benefits, find that respondent is entitled to reimbursement from the Workers Compensation Fund for all previously paid medical benefits and temporary total disability benefits, and find claimant failed to provide timely notice of her accidental injury to respondent. In the alternative, respondent requests this claim be remanded to the Judge for additional findings in the event the Board finds claimant injured her back working for respondent.

The only issue presented to the Board on this appeal is whether claimant injured her back working for respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant began working for respondent in December 1999 as a sales representative selling long distance services over the telephone. She alleges she sustained repetitive traumas to her low back working for respondent during the period from September 2000 until November 11, 2001, when she was terminated. Claimant maintains she either injured her back or aggravated preexisting degenerative disc disease in her lumbar spine by bending over at the waist while standing and using the keyboard at her work station. Moreover, claimant contends her immediate supervisor, Margaret Bufford (formerly Margaret Nixon), required her to stand for a significant portion of her shift.

Sales representatives spoke to potential customers over the telephone. If a customer's name or address needed correcting, or if some type of memorandum was needed, the sales representative entered the information into respondent's computer system. And if a sale was made, much more information was entered via a computer keyboard.

Claimant testified that in September 2000 she stood approximately 50 percent of the day. But she estimated that during the last month of her employment, she spent 50 to 60 percent of her time standing. And, according to claimant, she bent over at the waist from 12 to 18 times per day anywhere from 10 to 45 minutes for some of the calls. Claimant testified, in part:

Q. (Mr. Andersen) So 50 percent of that would be -- well, you had 20 corrections plus five, 25, would be the low end. You said 15, that would be 35. So anywhere between 12 and 18 times a day you would have to bend over and enter data into the computer, is that right?

A. (Claimant) Right.²

Claimant asserts she had no back problems before working for respondent.

On July 17, 2002, claimant had a right hemilaminectomy and fusion at L4-5 and she underwent a second fusion on December 12, 2003, at L5-S1. The doctors who testified disagree about whether those surgeries were appropriate.

Numerous witnesses testified regarding the extent claimant stood and bent at work and there is significant disagreement among those witnesses. Those witnesses also disagree about whether the standing was required and whether claimant complained that standing bothered her back. To some of the doctors who testified, the amount of standing and bending that claimant performed was critical in determining whether claimant's work caused her low back problems. The testimony attempting to quantify claimant's standing and bending at work and whether claimant voiced her back complaints is summarized, as follows:

1. At the July 2002 preliminary hearing, when claimant initially testified in this claim, she stated she was often required to stand at work until someone in her work group of approximately 18 people would make a sale. And claimant testified that she could stand anywhere from 15 minutes up to a couple of hours at a time.³ She also testified at that hearing she spent about 50 percent of her 8-hour shift standing and bending,⁴ and that when standing she would have to bend 90 degrees at the waist to use her keyboard to enter

² P.H. Trans. (July 25, 2002) at 45-46.

³ *Id.*, at 9.

⁴ *Id.*, at 10.

data into the computer.⁵ She stated she tried kneeling to avoid bending but kneeling made her knees ache and she would have pain in her lower back when she arose from kneeling.

But on cross examination, claimant modified her testimony somewhat as she said she stood for only 15 minutes to 1 hour at a time. She also explained she made from 350 to 500 telephone calls per day, which generated from 5 to 15 sales per day, and that approximately 20 times per day she would have to correct information in her computer. According to claimant, correcting that information might take her from 10 to 15 minutes,⁶ but completing a sales transaction might take her up to 45 minutes.⁷ Claimant estimated she bent over and entered data into her computer from 12 to 18 times per day.

Claimant also testified at that preliminary hearing that she began telling her immediate supervisor, Margaret Bufford, in September 2000 that her back was hurting and that standing was killing her back.⁸ Claimant maintains she told Ms. Bufford about her back complaints 2 or 3 times a week. Claimant, however, stated she did not request Ms. Bufford to prepare workers compensation papers because claimant was not sure her work was causing her back problem.⁹ Likewise, claimant testified she did not report her back problem to respondent's nurse as she did not know the nurse and did not know where the nurse was located in the building.¹⁰

2. Ms. Bufford also testified at the July 2002 preliminary hearing. Ms. Bufford testified that claimant was not required to stand and that she normally would not stand at work.¹¹ Ms. Bufford estimated that when claimant did participate in standing with others in the work group she would stand less than 20

⁵ *Id.*, at 13.

⁶ *Id.*, at 47.

⁷ *Id.*, at 46.

⁸ *Id.*, at 13, 14.

⁹ *Id.*, at 14.

¹⁰ *Id.*, at 41.

¹¹ *Id.*, at 51, 52.

percent of the day and she participated less than 20 percent of the time.¹² She estimated claimant would stand no more than 1½ hours per shift¹³ but more likely only about 30 minutes.¹⁴

According to Ms. Bufford, corrections to data took no more than 2 or 3 minutes as it only entailed correcting names. More importantly, Ms. Bufford indicated claimant would not have to stand while inputting data for sales.¹⁵ Ms. Bufford estimated that 10 minutes was the longest anyone stood.¹⁶

Contrary to claimant, Ms. Bufford testified claimant did not complain that standing on the job was causing back problems and that claimant did not say she had hurt her back at work.¹⁷ Conversely, Ms. Bufford stated she did not learn until July 2002 that claimant was alleging she had hurt her back at work. Ms. Bufford admitted claimant had said she was going to see a chiropractor for her back but claimant had related her symptoms to helping her husband build a fence and holding boards.¹⁸ Finally, Ms. Bufford testified she would have sent claimant to see the nurse if claimant had related her back problems to work. Moreover, Ms. Bufford indicated claimant should have known where the nurse was located as the nurse's office was near the front door and the employees had to walk past it every day. Also, Ms. Bufford testified that claimant's daughter, who also worked for respondent, went to the nurse's office on a regular basis.¹⁹

3. Claimant's co-worker Sabrina Faulk testified for respondent at a February 2003 preliminary hearing. Ms. Faulk, who eventually became a supervisor, worked as a sales representative for MCI during the period of September 2000 through November 1, 2001. Ms. Faulk's testimony regarding whether

¹² *Id.*, at 52.

¹³ *Id.*

¹⁴ *Id.*, at 59.

¹⁵ *Id.*, at 56.

¹⁶ *Id.*, at 59.

¹⁷ *Id.*, at 53.

¹⁸ *Id.*, at 54.

¹⁹ *Id.*, at 55, 56.

sales representatives were required to stand was equivocal. But Ms. Faulk's testimony was unequivocal that she never saw claimant bending at the waist at 90 degrees and never saw claimant standing and participating in the sales contests.²⁰ Ms. Faulk, who dated and lived with Ms. Bufford's son for a while, also testified that claimant never mentioned she had a back problem working for respondent but Ms. Faulk admits she really never talked with claimant. Ms. Faulk also indicated that claimant purchased a new house, helped build a fence, and then made back complaints to Ms. Bufford.²¹

4. Respondent presented the deposition testimony of Theresa Williams, who also worked with claimant. Ms. Williams said she spoke with claimant on a daily basis and claimant never mentioned she hurt her back at work or mentioned that standing caused problems with her low back.²² Nonetheless, Ms. Williams acknowledges that there were occasions when claimant said her back was hurting. Ms. Williams also testified that Ms. Bufford would ask their work group to stand up, but most of the time it would be in the morning when people were sleepy. She estimated they stood about 5 times per day for 5 minutes at most.²³ Ms. Williams denies that claimant stood 12 to 18 times per day and denies that claimant bent over 10 to 15 minutes at a time.²⁴ Ms. Williams, however, believes anyone could sit if they wanted.

Ms. Williams also remembers claimant telling Ms. Bufford about having back pain and having pain pills, but claimant did not stand at that time. She did not think claimant stood when she had back complaints. Moreover, Ms. Williams remembers claimant said her body hurt after building a fence. She believes she worked with claimant from 8 to 12 months. Finally, Ms. Williams mentioned that claimant and Ms. Bufford had a good relationship as they took smoke breaks together.

5. Respondent also presented the deposition testimony of Byram N. Huff, who worked for respondent from October 1997 until March 2002 and worked with claimant in the same bay for 1 to 2 years. Mr. Huff testified he talked with

²⁰ P.H. Trans. (Feb. 6, 2003) at 22.

²¹ *Id.*, at 24.

²² Williams Depo. at 5, 6.

²³ *Id.*, at 7.

²⁴ *Id.*, at 7, 8.

claimant almost every day but he does not recall she hurt her back at work or that her back was hurting. He also testified the employees in his bay were required to stand and that, on average, they stood 4 or 5 times a day and they stood until someone in their group made a sale. But he also indicated employees were not required to stand if they were ill or otherwise experiencing problems. In fact, Mr. Huff would not stand on occasion. He also would sit when he needed to correct computer data, which took him no more than 30 seconds,²⁵ and then return to standing. And sometimes the bay would go for days without standing. If someone would not stand, however, either Ms. Bufford or another sales representative would bring that fact to the attention of the recalcitrant employee.

Mr. Huff indicated it was not accurate that claimant would stand 12 to 18 times during a shift and disputed that she would have to bend for 10 to 15 minutes at a time.²⁶ He admitted, however, he never counted how many times a day he stood.²⁷ When Mr. Huff testified, he was wanting to return to work for respondent and leave his self-employed business of painting addresses on curbs.

6. Former co-worker and sales representative Bianca Sage Ukens estimated claimant stood about 60 percent of the time during claimant's last 6 months at work. Ms. Ukens also testified that sometimes the sales representatives would stand for an hour up to 1½ hours before they would make a sale and would be permitted to sit.
7. Dallas Murray, who was one of claimant's former co-workers but who was a college student when he testified, agreed that claimant stood at work 50 percent of the time.
8. Claimant's daughter, Christine Briggs, who worked for respondent in a nearby bay, estimated that claimant stood 10 to 11 times per day up to 10 to 15 minutes each time and sometimes up to a half hour.
9. Vicky Bickley, a former co-worker, testified sales representatives would stand anywhere from 4 to 10 times per day, depending on the circumstances, from 5 to 15 minutes at a time.

²⁵ Huff Depo. at 10.

²⁶ *Id.*, at 8.

²⁷ *Id.*, at 14.

10. Another former co-worker, Dustin Dunn, indicated the sales representatives under Ms. Bufford would stand during slow periods, or an average of 3 or 4 times per day for approximately 5 to 15 minutes each time.
11. Anthony Suber, a former co-worker and former sales representative, testified he worked as a sales representative for respondent from July 2000 to April 2002, during which he worked with claimant for about 18 months. He testified the sales representatives in claimant's bay stood probably 3 times, at most, during the day but each time they could be standing from a mere few seconds to 30 or 40 minutes.²⁸ He also said there would be times a person would be bending but that was not on every call and the bending may be only for 2 seconds. Mr. Suber also testified there were occasions that he did not stand; for instance, when he had vascular headaches. He disagrees with claimant's estimate that they would stand 12 to 18 times during the day.²⁹ Finally, he remembers that claimant said something about her back but he did not know how her injury occurred.³⁰
12. David R. Bigley, who worked for respondent for 2½ years as a sales representative and 4 years as a supervisor, left respondent's employment in the fall of 2004. He thought of Ms. Bufford as a mentor. He testified standing was used widely by respondent and that sometimes employees would stand up to 2 hours waiting for a sale.³¹ He also indicated Ms. Bufford's bay stood a lot of the time and Ms. Bufford would sometimes have the employees' chairs pushed into the hallway, which was another practice commonly used by respondent. Moreover, he testified claimant was not a "big hitter"³² and that she might have had to stand a lot. Mr. Bigley's testimony about how often claimant stood is somewhat equivocal as he said claimant probably stood only a couple of times a week³³ and later said it was

²⁸ Suber Depo. at 15.

²⁹ *Id.*, at 8, 9.

³⁰ *Id.*, at 6.

³¹ Bigley Depo. at 8.

³² *Id.*, at 13.

³³ *Id.*

very possible she had to stand more than once a day and she was probably asked to stand several times on some days.³⁴

Mr. Bigley, however, did testify that standing was not optional.³⁵ He also would dispute Ms. Bufford's testimony that claimant only stood 10 to 15 minutes per day³⁶ because some of Ms. Bufford's sales representatives stood for 2 hours at a time.³⁷

13. During a deposition in May 2005, claimant testified she first noticed symptoms in her low back in September 2000 and that she later told Ms. Bufford that she was going to see a chiropractor. At that deposition, however, claimant testified she told Ms. Bufford that she did not know what was causing her symptoms.³⁸ She also testified her low back symptoms began at work after she had been standing for about 15 minutes.³⁹ And she said she did not know when she finally attributed her low back symptoms to work but she believed that was October 2000.⁴⁰ Claimant also testified she thinks she told Ms. Bufford at least 3 times that her back complaints were work-related and on 4 occasions Ms. Bufford gave her a Lortab and sent her back to work.

Claimant testified that she stood at work anywhere from 5 to 10 times per day, sometimes more, for 10 to 45 minutes, but the longest she stood was less than an hour.⁴¹ She also testified that she always stood as Ms. Bufford threatened to write her up if she did not.⁴² Finally, she testified she saw Dr. Robert L. Eyster in May 2002 and told him that her back problems were

³⁴ *Id.*, at 17, 18.

³⁵ *Id.*, at 16.

³⁶ *Id.*, at 26.

³⁷ *Id.*, at 26, 36.

³⁸ Briggs Depo., Ex. 2 at 23.

³⁹ *Id.*, Ex. 2 at 24.

⁴⁰ *Id.*, Ex. 2 at 25, 28.

⁴¹ *Id.*, Ex. 2 at 34, 35.

⁴² *Id.*, Ex. 2 at 39.

due to leaning over all the time at work. But she also testified she submitted her medical bills from her family physician, Dr. Cynthia Ward, and from Dr. Eyster to her husband's health insurance carrier as she was not sure what was causing her back pain.⁴³

Assuming claimant did an appreciable amount of bending in her job, both Dr. Paul S. Stein and Dr. Robert L. Eyster initially concluded claimant's job activities aggravated the degenerative disc disease in her back. Claimant, in fact, advised Dr. Stein that she stood from 5 to 7 times per day from 5 to 20 minutes each time. Dr. Stein's April 19, 2005, medical report reads, in part:

Ms. Briggs says that the first time she ever had a problem with her lower back was approximately May of 2001. She recalls no specific injury or accident. At that time, she was employed as a telemarketing sales representative for MCI, where she had been employed since 1999. Most of this job was done sitting, using the telephone and computer. There was a supervisor who would take the chairs away from her group of workers when someone did not meet a quota or make sales. There were 21 people working in a bay and when this happened, they were required to work standing up and bent over until the quota was met or a sale made. **This particular activity started in 2000 and happened sometimes between five and seven times in a day, "depending on what type of mood she was in, every day at least five to seven times". Frequently they would work in this position for five minutes and up to twenty minutes at a time.** Ms. Briggs was terminated from her employment on 11/11/01 for difficulty with her supervisor that she states was unrelated to the back problem.

....

7. If Ms. Briggs has a degenerative process in her low back, did the work at MCI WorldCom cause a permanent change in the physical condition of her back via permanent aggravation or acceleration of the condition?

This appears to be the primary question in regard to causation. The answer is difficult because of the lack of consistency in testimony by coworkers, some of whom describe a great deal of standing with repetitive bending, and some of whom indicate a much lesser degree, as well as an element of personal choice. However, even the latter indicate periods of standing and bending forward in order to handle the computer. I would, therefore, have to state, within a reasonable degree of medical probability (although perhaps just barely), that there was aggravation of the lower back by the work activity. One cannot state at this point whether the original aggravation would have been permanent or temporary because of the surgery

⁴³ *Id.*, Ex. 2 at 56.

done, which I believe to be a component of the current symptomatology.⁴⁴
(Emphasis added.)

In short, Dr. Stein initially related claimant's low back problems to her work after he read some of the testimony from claimant's former co-workers. Dr. Stein, who is a neurological surgeon, first saw claimant in April 2005. When he testified in September 2008, the doctor stated that claimant originally may have had a back strain and mild disc disease that had been aggravated. Nonetheless, if claimant did not frequently bend or stand for a prolonged period, the doctor believed that merely standing 3 to 5 times per day from 5 to 15 minutes at a time may have caused discomfort or a temporary strain but it would not likely have caused any permanent injury or structural change.⁴⁵ Moreover, the doctor believed the temporary discomfort or strain should have resolved when the offending activity ceased.

Dr. Stein believed Dr. Eyster did not adequately evaluate claimant before he performed back surgery.⁴⁶ In short, Dr. Stein would not have operated. He believes the first fusion failed for whatever reason but he is not saying that Dr. Eyster deviated from the appropriate standard of care.

Assuming it were true that claimant stood for 60 percent of the day as long as 1½ hours at a time, bent at the waist at 90 degrees, and typed, then Dr. Stein would conclude claimant's work more than likely aggravated her lower back and caused the pain she had that resulted in her surgery.⁴⁷ And he would reach the same conclusion if claimant's July 2002 testimony were true that she stood from 15 minutes to 2 hours at a time, stood for 50 percent of the day, and bent at a 90-degree angle to type for up to 12 to 18 times per day from 10 to 45 minutes at a time.⁴⁸ Nevertheless, he also testified he does not know why claimant continued to experience pain after she quit working for respondent or why she would progressively worsen, especially considering the MRI and EMG he reviewed.⁴⁹ The doctor was given numerous other hypothetical questions regarding the amount of standing and bending claimant performed and his response varied, depending upon the amount of time claimant stood and the number of times claimant bent. According to

⁴⁴ P.H. Trans. (June 23, 2005), Resp. Ex. 1.

⁴⁵ Stein Depo. at 17.

⁴⁶ *Id.*, at 19.

⁴⁷ *Id.*, at 66.

⁴⁸ *Id.*, at 72.

⁴⁹ *Id.*, at 70.

Dr. Stein, bending was the most important factor as bending stresses the vertebral discs and soft tissue in the back.⁵⁰

Finally, Dr. Stein was asked about notes in a chiropractor's records from May 2002 regarding a 10-hour car ride and carrying a grandchild and from June 2002 regarding leaning over and doing yard work. Dr. Stein opined the activities noted in the May 2002 chiropractor's records would not have caused claimant a permanent problem. The doctor also opined those activities and the leaning over and doing yard work noted in the June 2002 records could indicate activities that could have caused claimant discomfort and activities that could be equally responsible for the complaints that she was having.⁵¹ After examining claimant in January 2007, Dr. Stein concluded claimant had a 20 percent whole person impairment that he attributed to the two surgeries she had undergone.⁵²

Dr. Eyster, who is a board-certified orthopedic surgeon, testified he first examined claimant in May 2002 when she was referred by Dr. Cynthia Ward. At that visit, claimant complained of low back pain that went into her buttocks and down her legs. An MRI study indicated a mild bulge at L4-5. Dr. Eyster told claimant to practice good back techniques and to keep her weight down. He did not recommend surgery. Claimant, however, returned in early July 2002 with increased complaints. This time claimant could not fully bend at the waist, which she could do in May. At the latter visit, she then had positive straight leg raising tests at 45 degrees bilaterally.

In July 2002, Dr. Eyster wrote Dr. Ward and advised that claimant was attributing her back pain to bending at work. But claimant did not tell Dr. Eyster that between her May and July 2002 visits (1) she had experienced increased pain after a 10-hour car trip in May, (2) she had received numerous treatments from a chiropractor, (3) she had experienced increased pain after carrying her grandchild in late May, or (4) she had experienced increased back pain in June while leaning over and doing yard work. At the July 2002 visit, claimant requested a back fusion, which the doctor performed on July 17, 2002.

Dr. Eyster also testified that in August 2002, following surgery, claimant slipped on stairs and had increased pain in her low back and tingling in her legs. Claimant's condition did not improve and she developed sacroiliac joint irritation, which the doctor said could be

⁵⁰ Dr. Stein said the hypothetical facts based upon the descriptions provided by Ukens, Murray, Christine Briggs, and claimant would support a permanent injury. But the hypothetical facts based upon the descriptions provided by Bufford, Huff, Dunn, Bickley, Faulk, Suber, and Williams did not. And the hypothetical based upon the testimony of Bigley was not detailed enough to formulate an opinion.

⁵¹ Stein Depo. at 20-26.

⁵² *Id.*, at 28.

the result of increased stress at that joint due to the July 2002 L4-5 fusion. After trying water therapy and epidurals, Dr. Eyster reinforced the possible nonunion at the L4 and L5 vertebrae and fused the L5 and S1 vertebrae in December 2003. The doctor last saw claimant in July 2006, at which time claimant was experiencing symptoms in the area of her coccyx, which Dr. Eyster believed was referred pain from her surgical site.

Considering the prolonged car ride and the increased symptoms claimant experienced from that activity, as well as that from doing yard work and carrying her grandchild, Dr. Eyster was unable to say the complaints claimant had in July 2002 were caused by her work.⁵³ And if claimant only stood at work 3 to 5 times per day from 5 to 15 minutes at a time, then a 10-hour car trip, carrying her grandchild, and leaning over doing yard work would have had a greater effect on her back than her work.⁵⁴

Dr. Michael H. Munhall, who is a physical medicine doctor, also testified. The doctor's practice is divided 35 percent treating patients and 65 percent performing evaluations, most of which are performed for claimants' attorneys in workers compensation claims. He examined claimant in January 2002 when the health insurance carrier who was then paying claimant's medical expenses sought a second opinion. Claimant told Dr. Munhall her back pain came on gradually and there had been a slow, progressive evolution over one year. Claimant did not give Dr. Munhall a history of being injured while at work for respondent. Indeed, claimant denied being injured at work.⁵⁵ In fact, when she prepared the patient information sheet for the doctor, she marked "no" where the form asked if she had been injured on the job.⁵⁶

Based upon the January 2002 examination, Dr. Munhall found claimant had clinical evidence of lumbar derangement syndrome and myofascial pain syndrome and he recommended a special low back physical therapy program. The doctor did not see claimant again until late January 2003, at which time she had undergone surgery by Dr. Eyster. Claimant continued to have low back pain without significant improvement. She again denied injury while working for respondent.⁵⁷

⁵³ Eyster Depo. at 29, 30.

⁵⁴ *Id.*, at 31, 32.

⁵⁵ Munhall Depo. at 6.

⁵⁶ *Id.*, at 42.

⁵⁷ *Id.*, at 11.

Dr. Munhall testified that based upon the history claimant provided he is unable to state what caused her back problems. He acknowledges, however, that the health insurance carrier which requested his evaluation did not ask that he address the cause of her problems. Moreover, he acknowledges that there was information in claimant's records that noted she had worked for respondent and had a supervisor who required her to stand at her computer to input data.

Like Dr. Stein, Dr. Munhall believed claimant should not have had back surgery.

Claimant hired Dr. Pedro A. Murati, whose specialty is chronic pain management and physical medicine and rehabilitation, to examine and evaluate claimant. The doctor stated his practice was 50 percent treating patients and 50 percent providing medical evaluations. He examined claimant in both December 2002 and October 2007 and concluded there was no question claimant now has failed back surgery syndrome and right sacroiliac joint dysfunction. Dr. Murati also rated claimant as having a 20 percent whole person functional impairment. The doctor relates claimant's low back problem to the bending she did while working for respondent. And although he does not know how long or how often claimant bent over at work, Dr. Murati indicated that did not affect his opinion as any sustained bending places an individual at risk and it only takes milliseconds for a disc protrusion to form. Dr. Murati testified there is no study that says how long it takes a protrusion to develop. And he believes that Mr. Bigley's testimony supports his opinion.

In addition, Dr. Murati opined that once claimant had developed chronic pain syndrome anything could have aggravated her condition; for example, driving or sitting in a car for 10 hours, prolonged standing or sitting, or even carrying a 2-year-old child. But those activities would not have caused claimant's injury, only increased her pain.

Last but not least, respondent presented the testimony of the chiropractor claimant saw in April, May, and June 2002, Dr. Dean McGee. When she first saw Dr. McGee in mid-April 2002, claimant reported she was concerned with back pain and weight gain. Claimant reported complaints in her mid-back, sternum, lower portion of her neck, and low back. Her primary complaint, however, was low back pain made worse by prolonged standing. In addition, claimant provided a history that she had worked for respondent in the past year and her chair would be taken away and she would have to bend over.⁵⁸ She also said the onset of her back pain had been gradual.

In all, Dr. McGee's office saw claimant 17 times from April 18 through June 18, 2002. Claimant indicated the purpose of her visit was "To find out why I hurt all the time

⁵⁸ McGee Depo. at 26.

and take care of it.”⁵⁹ She also noted at her first visit that she first noticed her symptoms 6 months before, or in November 2001.⁶⁰ The doctor’s notes indicate that on May 23, 2002, claimant reported increased low back pain as she had driven from Colorado in 10 hours; on May 28, 2002, claimant reported increased pain and that she had been carrying a grandchild a lot over the previous weekend; and finally, on June 12, 2002, she reported increased low back pain with leaning over and doing yard work.⁶¹ Commenting upon those occurrences, Dr. McGee testified the trip to Colorado had a minor impact on claimant, that carrying the grandchild also had a minor impact, and that almost dropping the child had a minor to moderate impact. Nevertheless, the doctor believed claimant’s pain improved as he treated her between April 18 and June 18, 2002.

Dr. McGee’s final diagnosis was lumbar disc displacement and lumbosacral dyskinesia, which he defined as the joint not moving properly. The doctor neither attempted to rate claimant’s impairment nor did he provide an opinion whether claimant’s low back problem was related to the work she performed for respondent.

One of the critical issues in this claim is whether the bending claimant performed at work while inputting data into respondent’s computer system aggravated a preexisting condition of degenerative disc disease in her lumbar spine. Although there was some testimony that claimant was not required to stand and bend at work, the greater weight of the evidence establishes it was not uncommon for the sales representatives to stand until someone in their group made a sale. And those who did not stand were, at the least, subjected to peer pressure from their co-workers.

But the Board finds claimant’s estimate that she stood 50 to 60 percent of the day and bent over at a 90-degree angle 12 to 18 times each day anywhere from 10 to 15 minutes up to 45 minutes each time is exaggerated. As co-workers testified, the time required to correct the name or address in respondent’s computer system could be measured in seconds. Claimant’s assertion that the standing and bending at work hurt her back is inconsistent with failing to relate that information to Dr. Munhall when she first saw him in January 2002. Indeed, claimant noted in a form that she prepared for Dr. Munhall in January 2002 that she had not been injured at work.

Likewise, claimant’s testimony that she did not report her back problems to respondent’s nurse because she did not know who the nurse was or where the nurse was located is not credible. The greater weight of the evidence establishes the nurse was

⁵⁹ *Id.*, Ex. 2.

⁶⁰ *Id.*, at 12.

⁶¹ *Id.*, at 15, 16 and Ex. 2.

located near the entrance of the call center and that claimant's daughter saw the nurse several times.

The Board finds claimant did not perform the requisite amount of bending that both Dr. Stein and Dr. Eyster thought would be required to permanently aggravate the degenerative condition in claimant's back. Dr. Munhall, who is regularly called upon to testify for injured workers, was unable by way of claimant's history to relate her low back problems to her work. And claimant's most recent chiropractor, Dr. McGee, did not relate her low back problems to work. Claimant's expert medical witness, Dr. Murati, related her low back problems to her work and he testified that it is *sustained* bending that places an individual at risk for developing a disc protrusion and that standing leaning over for a *prolonged* period would explain her injury. But Dr. Murati was unaware how long claimant bent over at work or how often.

Considering the entire record, the Board finds claimant has failed to prove she injured her back working for respondent. Accordingly, the March 30, 2009, Award should be affirmed.

Respondent requested the Board to find that respondent is entitled to reimbursement from the Workers Compensation Fund for all previously paid medical benefits and temporary total disability benefits, but that request should be made to the Director of the Division of Workers Compensation. K.S.A. 44-534a(b) provides:

If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525, and amendments thereto, as determined in the full hearing on the claim. **The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined.** Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award. (Emphasis added.)

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁶² Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the March 30, 2009, Award entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of September, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
 Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
 John D. Clark, Administrative Law Judge

⁶² K.S.A. 2008 Supp. 44-555c(k).